

Staff Summary Report



Council Meeting Date: 02/07/08

Agenda Item Number: _____

SUBJECT: Request approval of a Resolution authorizing the Mayor to execute a Naming Rights Agreement between the City of Tempe, Salt River Project Agricultural and Power District ("SRP") and the Rio Salado Foundation ("Foundation"), for the naming of the Tempe Town Lake Marina.

DOCUMENT NAME: 20080207casv02 STATE LEGISLATURE (0107-06) Resolution No. 2008.09

SUPPORTING DOCS: Yes.

COMMENTS: Approval of Resolution No. 2008.09 authorizing the execution of a Naming Rights Agreement allowing SRP to name the Tempe Town Lake Marina for a total of ten years, for, among other terms, a naming rights fee to the Foundation in the total amount of \$1,000,000, subject to the terms and conditions as specified in the Agreement.

PREPARED BY: Andrew B. Ching, City Attorney, (480) 350-8575

REVIEWED BY: Chris Salomone, Community Development Manager, (480) 350-8294

LEGAL REVIEW BY: Andrew B. Ching, City Attorney, (480) 350-8575

FISCAL NOTE: See above.

RECOMMENDATION: Recommend approval of Resolution No. 2008.09.

ADDITIONAL INFO: None.

RESOLUTION NO. 2008.09

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A NAMING RIGHTS AGREEMENT BETWEEN THE CITY OF TEMPE, THE SALT RIVER PROJECT AGRICULTURAL AND POWER DISTRICT (“SRP”) AND THE RIO SALADO FOUNDATION (“FOUNDATION”), FOR THE NAMING OF THE TEMPE TOWN LAKE MARINA.

WHEREAS, SRP is a political subdivision of the State of Arizona that provides electric utility service, water storage and water delivery service to parts of central Arizona, and SRP is the owner of the registered trademarks “SRP” and the SRP logo; and

WHEREAS, Tempe owns and operates the Tempe Town Lake Marina, a 13-acre development located on the north side of Tempe Town Lake, south of the 202 freeway at about College Avenue (the “Marina”); and

WHEREAS, Foundation is a nonprofit foundation whose mission is to ensure the success of the Rio Salado Project as a major regional destination and urban development through the creation of public/private partnerships via a comprehensive and ongoing capital fundraising campaign; and

WHEREAS, SRP, Tempe and the Foundation are desirous of entering into an agreement whereby, in exchange for SRP’s agreement to contribute to Tempe and Foundation the consideration described in this Agreement, Tempe shall use the Mark and Logo (as defined below) exclusively as the name of the Marina in accordance with the terms and conditions set forth in the Naming Rights Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

The City Council authorizes the Mayor to execute the Naming Rights Agreement between the City of Tempe, SRP and the Foundation on file with the City Clerk’s office.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of _____, 2008.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

NAMING RIGHTS AGREEMENT

THIS NAMING RIGHTS AGREEMENT (“Agreement”) is made as of the ____ day of _____, 2008, by and among SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an agricultural improvement district organized and existing under the laws of the State of Arizona (“SRP”), the CITY OF TEMPE, a municipal corporation organized and existing under the laws of the State of Arizona (“Tempe”) and RIO SALADO FOUNDATION, an Arizona nonprofit corporation formerly known as RIO SALADO TOWN LAKE FOUNDATION (“Foundation”). The following recitals form the basis for this Agreement and are made a material part hereof.

RECITALS

A. SRP is a political subdivision of the State of Arizona that provides electric utility service, water storage and water delivery service to parts of central Arizona. SRP is the owner of the registered trademarks “SRP” and the SRP logo.

B. Tempe owns and operates the Tempe Town Lake Marina, a 13-acre development located on the north side of Tempe Town Lake, south of the 202 Freeway at about College Avenue (the “Marina”). Tempe is also constructing a related development consisting of a proposed 35,000 to 40,000 square foot boat house for rowing programs and Town Lake recreation and operations activities (the “Boat House”).

C. Foundation is a nonprofit foundation whose mission is to ensure the success of the Rio Salado Project as a major regional destination and urban development through the creation of public/private partnerships via a comprehensive and ongoing capital fundraising campaign.

D. SRP, Tempe and the Foundation are desirous of entering into an agreement whereby, in exchange for SRP’s agreement to contribute to Tempe and Foundation the consideration described in this Agreement, Tempe shall use the Mark and Logo (as defined below) exclusively as the name of the Marina in accordance with the terms and conditions set forth herein, and solely for that purpose SRP will grant to Tempe certain rights in SRP’s trademarks.

AGREEMENT

In consideration of the foregoing recitals, the mutual promises and considerations in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Tempe, Foundation and SRP agree as follows:

1. Grant.
 - (a) As used herein, the following terms shall have the following meanings:

(i) The "Mark" shall mean the words "SRP Marina at Tempe Town Lake."

(ii) The "Logo" shall mean the Mark written in the style, typeface and design designated on Exhibit A.

(iii) The "Intellectual Property" shall mean, collectively, the Mark and the Logo.

(b) Subject to the remaining terms of this Agreement, SRP grants Tempe the right to use the Intellectual Property in connection with this Agreement. The foregoing grant is non-exclusive and non-assignable except as hereinafter provided. Tempe has not acquired any right, title, interest or claim of ownership in the Intellectual Property except for the license granted in this Agreement. Upon termination of this Agreement, any and all rights granted to Tempe in the Intellectual Property shall automatically terminate. Tempe further will not alter, modify, dilute or misuse the Intellectual Property, bring any of it into dispute, or challenge SRP's rights in or to the same. Without limiting the generality of the foregoing, Tempe will not enter into sponsorship arrangements for the Marina or the Boat House involving alcoholic beverages, tobacco products or gambling casinos. The preceding sentence shall not be construed, however, to affect Tempe's ability to sell or advertise the sale of alcoholic beverages at the Marina or the Boat House.

2. Indemnity.

2.1 Tempe shall hold SRP harmless from and indemnify (and, upon written request from SRP, also defend) SRP and members of its governing bodies, its officers, agents and employees against any and all suits, actions, claims, loss, demands, damages, liabilities, costs and expenses of every kind, including costs and reasonable attorney's fees for defending same, which may relate to or arise or result from the Marina or its operations, including, but not limited to, the exercise by Tempe of the rights granted to it in this Agreement, but not including any matter as to which SRP is obligated to Indemnify Tempe by reason of Sections 2.2, 2.3 and 2.4 below.

2.2 SRP shall hold Tempe harmless from and indemnify and defend Tempe against any and all suits, actions, claims, losses demands, damages, liabilities, costs and expenses of every kind, including costs and reasonable attorney's fees for defending same, which may relate to or result from infringement or unfair competition claims against Tempe arising out of or related to the parties' use of the Intellectual Property or Tempe's use of the Intellectual Property as permitted by this Agreement.

2.3 SRP and Tempe understand and agree that SRP's use of the Marina or Boathouse as contemplated in Section 8 of this Agreement will be subject to Tempe's special event permit process which, among other things, will include mutually acceptable indemnification obligations related to such use.

2.4 SRP agrees that, if SRP employees or agents are engaged in any SRP activity at the Marina or Boathouse for which SRP has not obtained a special event permit, SRP shall hold Tempe harmless from and indemnify Tempe and members of its governing bodies, its officers, agents and employees against any and all suits, actions, claims, loss, demands, damages, liabilities, costs and expenses of every kind, including costs and reasonable attorney's fees for injury to or death of any person or persons or damage to property, but only to the extent caused by the negligence or other wrongful conduct on the part of such SRP employees or agents.

3. Insurance.

Tempe shall provide and maintain, throughout the Term of this Agreement, a commercial general liability insurance policy with (a) an insurance company satisfactory to SRP, (b) limits of not less than \$2,000,000 per occurrence, and (c) loss deductibles in commercially reasonable amounts. The insurance shall cover SRP as an additional insured and shall not be canceled or materially changed without at least thirty (30) days written notice to SRP. Tempe shall furnish certificates of insurance to SRP upon execution hereof and within thirty (30) days of any insurance renewals.

4. Term.

The initial term of this Agreement ("Initial Term") shall commence on the date hereof and shall end on the tenth (10th) anniversary of the date of this Agreement. This Agreement may be renewed upon mutual agreement of the parties. For purposes of this Agreement, the "Term" shall mean the Initial Term and any renewal term, as applicable.

5. Placement and Use of Mark and Logo.

During the Term, Tempe hereby agrees to display the Intellectual Property in accordance with the graphics and color guidelines established by SRP and provided to Tempe from time to time. Tempe further agrees, without limitation, as follows:

(a) To use the Mark and cause the Mark to be used as the exclusive name of the Marina;

(b) To modify and maintain the existing monument sign at the Marina, which is approximately three feet high and 15 feet wide, which sign shall bear the Mark and Logo in the manner depicted on Exhibit A hereto;

(c) To install and maintain a banner approximately five feet wide and fifteen feet high in a mutually agreed upon location at the Marina (including exposure to the Loop 202) which shall bear the Mark and Logo in the manner depicted on Exhibit A hereto;

(d) To install and maintain interpretive displays in a mutually agreed upon location at the Marina or at the Boat House demonstrating the link between the SRP

watershed and Tempe Town Lake. SRP and Tempe agree to collaborate on the development of the interpretive displays;

(e) To cause the Mark and Logo to be displayed on any other signs that are installed at or around the Marina that identify the Marina;

(f) To cause the Mark and Logo to be used in connection with all published references to the Marina, including references on any web site maintained by Tempe relating to the Marina. Tempe agrees to include links to SRP's web site on the Tempe web site;

(g) To cause the Mark and Logo to be mentioned and displayed in connection with all public service announcements made prior to, during and after each event at the Marina;

(h) To cause the Mark and Logo to appear, at Tempe's cost, on all tickets, parking passes, mailings, brochures, newsletters, programs, publications, schedules, advertising and other printed materials or supplies relating to or to be used in connection with the Marina or any event at the Marina (collectively, "Printed Materials") to the extent that the preparation or purchase of such Printed Materials are within the reasonable control of Tempe;

(i) To use its reasonable best efforts to cause the Mark and Logo to appear on all Printed Materials to the extent that the preparation or purchase of such Printed Materials are not within the reasonable control of Tempe;

(j) To install and maintain or cause to be installed and maintained appropriate directional signs directing pedestrian and vehicular traffic to the Marina;

(k) Without limitation, to install such other appropriate signage displaying the Mark and Logo at such location(s) and of such size and appearance as mutually agreed upon by the parties;

With regard to the foregoing requirements, the parties agree to act in good faith to agree upon the exact size, location and/or depiction of the Mark and Logo to be employed by Tempe, it being agreed that Tempe shall be responsible for all of the costs and expenses for installation and maintenance of the foregoing signage, except as otherwise specifically agreed by the parties. All signage provided hereunder shall be maintained in first-class condition and, as reasonably necessary, replaced at Tempe's cost.

6. Change of Mark or Logo.

In the event that SRP selects a mark or logo different from the Mark and Logo to be employed hereunder, Tempe agrees not to unreasonably withhold its consent to the substitution of an alternative or additional mark or logo, provided: (a) SRP grants to Tempe a license to use such mark and logo substantially in the form of the license granted hereby; and (b) SRP pays the costs incurred by Tempe in discontinuing the use of

the Mark or Logo and the substitution of an alternative mark or logo.

7. Contributions and Rights Fee.

In consideration for the rights granted under this Agreement, SRP has contributed and hereby agrees to contribute:

(a) To Tempe: a \$2.2 million credit for a previous conveyance of approximately fifty acres of property deeded to the City of Tempe; and

(b) To Foundation: a Rights Fee in the aggregate amount of \$1,000,000 cash, payable to Foundation as follows:

(i) Four equal quarterly installments of \$25,000, commencing on February 1, 2008 and payable on the 1st day of May, August and November of 2008

(ii) Nine equal annual installments of \$100,000 per year for nine years, commencing on February 1, 2009 and payable annually thereafter on February 1 through February 1, 2017.

Upon any termination of this Agreement other than a lawful termination by Tempe as a result of a default by SRP hereunder or pursuant to Section 10 hereof, SRP shall be entitled to a pro rata refund of the Rights Fee applicable to the remaining portion of the Term for which the Rights Fee has been paid. SRP shall further be entitled to a pro rata refund of the Rights Fee for any period during the Term during which the Marina is not in full operation as contemplated by the parties hereunder.

8. Additional Benefits

In exchange for the contributions and Rights Fee, Tempe shall provide the following additional benefits to SRP, which are subject to Tempe's special event permit process, if applicable:

(a) First right of refusal, subject to prior booking, for up to eight blocks of time per year (but not more than two consecutive days, and including weekends or holidays) for use of the Marina and/or the Boat House during major community events at normal rates, subject to Tempe's special event permit process, if applicable (such as Fourth of July and Rock n Roll Marathon or other similar community-based events);

(b) First right of refusal for up to six additional customer hosting opportunities or stagings at the Marina for SRP-sponsored events such as the MS150 Bike Race and the JDRF Walk to Cure Diabetes;

(c) Four SRP employee-hosting opportunities at the Boat House for events such as the annual Employee Recognition Event and Karl F. Abel Awards Luncheon;

(d) Right of first refusal for sponsorship of events to be held on the east end of the lake and park, north of the Tempe Town Lake, east of the Mill Avenue bridge; and

(e) Similar hosting, sponsorship, signage, etc. opportunities to be mutually agreed upon during the period after execution of this Agreement and before completion of the Marina and Boat House facilities.

SRP shall provide not less than six months written notice of SRP's intent to use and to schedule use of the Marina and Boat House facilities as provided above. In addition, application to the Events Task Force must be received 120 days prior to the proposed event. SRP understands and agrees that the rights granted under this Agreement relating to the Boat House may require approval of the developer of the Boat House. Tempe agrees to use its best efforts to obtain such approval for the benefit of SRP.

9. Restrictions on Use of Rights Fee

Foundation agrees that it will use the Rights Fee solely in support of its mission of ensuring the success of the Rio Salado Project as a major cultural, recreational and urban destination in accordance with Foundation's Donor Recognition Guidelines, which is incorporated herein by reference.

10. Default and Remedies.

(a) Default by SRP. In the event that SRP fails to pay any installment of the Rights Fee when due, and such failure continues for a period of fifteen (15) days after written notice to SRP, or in the event SRP fails to comply with any obligation of SRP herein contained and such failure continues for a period of thirty (30) days after written notice to SRP, Tempe shall be entitled to exercise any or all of the following remedies:

(i) If and only if such failure is material (for this purpose nonpayment of all or part of the Rights Fee for said fifteen (15) days shall be deemed material), to cause the Term to end on a date designated in such notice, which date may not be less than ninety (90) days after the date of such notice; or

(ii) To seek an appropriate legal or equitable remedy from a court of competent jurisdiction.

(b) Defaults by Tempe or Foundation. The following shall constitute "Tempe Defaults" hereunder:

(i) If Tempe fails to comply with any of its material obligations under this Agreement, which failure shall continue for a period of thirty (30) days after written notice thereof to Tempe from SRP; provided, however, if such failure is not reasonably curable within thirty (30) days, Tempe shall be afforded a

reasonable period of time not to exceed ninety (90) days to cure or remedy such failure so long as Tempe in good faith is attempting, at all reasonable times during such period, to cure such failure; or

(ii) If Tempe utilizes as the name of the Marina any name other than the Mark; or

(iii) If Tempe, on one or more occasions, voluntarily and without the occurrence of a Force Majeure ceases Marina Operations for an aggregate period of more than 60 days; or

(iv) Upon the occurrence of a Force Majeure which results in a cessation of Marina Operations for more than 180 days; or

(v) If Foundation fails to comply with its obligations under Section 9 of this Agreement.

For purposes of this Agreement, (a) "Force Majeure" shall mean a fire or other casualty, act of God, strike, lockout, or other cause beyond the control of Tempe, and (b) "Marina Operations" shall mean the events and activities normally conducted at the Marina throughout each year, including without limitation rowing, sailing, and paddling practice and training, the Music at the Marina series and competitive regattas.

Upon the occurrence of a Tempe Default, SRP shall have the right to any one or more of the following remedies: (1) to terminate this Agreement, (2) to receive a retroactive adjustment of the Rights Fee in accordance with the number of days from and after the date of this Agreement through and including the date on which the Tempe Default occurred in the case of a Tempe Default described in (i) or (ii) above, or the date on which Tempe first ceased operating the Marina in the case of a Tempe Default described in (iii) or (iv) above, and (3) to seek an appropriate legal or equitable remedy from a court of competent jurisdiction. Notwithstanding anything to the contrary herein, in the event that, during the Term hereof, the Marina Operations are ceased for any reason, the Term shall be automatically extended for the aggregate period during which the Marina Operations are ceased.

11. Assignment; Merger or Acquisition of SRP.

No party shall transfer or assign its rights or obligations under this Agreement without the other parties' prior written consent. Notwithstanding the foregoing, in the event that SRP merges with or is acquired by a third party, SRP may, without the necessity of Tempe's consent, assign all of its rights under this Agreement to the successor party, provided that the successor party agrees, in writing, to be bound by all obligations of SRP under this Agreement, including, without limitation, the obligation to pay the Rights Fee under Section 7. Subject to the foregoing, this Agreement shall inure to the benefit of the successors and assigns of the parties hereto.

12. Equitable Relief.

Tempe acknowledges that the rights and privileges granted to SRP hereunder are special, unique, extraordinary and impossible of replacement, which gives them a peculiar value, the loss of which could not be reasonably or adequately compensated in damages in an action at law, and that Tempe's failure or refusal to perform its obligations hereunder would cause SRP irreparable loss and damage. If Tempe fails or refuses to perform such obligations, SRP shall be entitled to injunctive or other equitable relief against Tempe, including temporary relief before a time at which a preliminary hearing may be held by a court of competent jurisdiction to prevent the continuance of such failure or refusal or to prevent Tempe from granting rights to others in violation of this Agreement.

13. Publicity.

All public statements regarding the contributions and naming rights described herein shall be mutually agreed upon prior to release. An official public dedication will be scheduled jointly among SRP and Tempe.

14. Morals Clause.

If either party hereto or any of its officers, directors or board members commits any act which, in the reasonable and good faith opinion of the other party, would disparage or impair the reputation and integrity of the other party hereto (including, without limitation, any criminal indictment, ethical violations or any other act of moral turpitude), the other party hereto shall have the right to terminate this Agreement upon thirty (30) days written notice.

15. Miscellaneous Provisions.

(a) Notices. All notices, offers, consents or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given or made if delivered personally or by messenger or delivered by mail, and addressed to the address of the intended recipients at the following addresses:

To Tempe: City of Tempe
 City Manager
 21 E. Fifth Street
 Tempe, Arizona 85281
 Attn: Nancy Ryan, Rio Salado Project Manager

To SRP Salt River Project
 1521 N Project Drive
 Tempe, Arizona 85281
 Attn: Catherine M. Foley
 Manager, SRP Corporate Affairs, Mail Stop PAB334

To Foundation: Rio Salado Foundation
P. O. Box 1498
Tempe, Arizona 85280J
Attn: Stacey Pawlowski, Executive Director

Either party may change its address by giving notice in writing stating its new address to the other party.

(b) Relationship. Neither party hereto shall be or become the agent of the other party for any purpose in connection herewith. SRP shall not be liable for Tempe's acts or omissions. This Agreement does not create a partnership or joint venture. Nothing herein contained shall be construed to give SRP any control over or responsibility for operation of the Marina.

(c) Non-Waiver. No delay or omission of any party to exercise rights or powers under this Agreement shall impair any such right or power or shall be construed to be a waiver of any default or acquiescence therein. No waiver of any default shall be construed, taken, or held to be a waiver of any other default, or waiver, acquiescence in, or consent to any further or succeeding default of the same nature.

(d) Attorneys' Fees. In the event that either party is required to commence any legal proceedings to enforce the provisions hereof or to seek any other legal redress, the prevailing party shall be entitled to recover its reasonable attorneys' fees incurred in connection herewith.

(e) Entire Agreement. This Agreement contains the entire understanding between the parties and supersedes any prior understandings and written or oral agreements between them respecting this subject matter. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Agreement that are not fully expressed in the Agreement.

(f) Reasonableness. Wherever either party to this Agreement is required to approve or consent to or be satisfied as to any matter, such party agrees that such approval, consent or satisfaction shall not unreasonably be withheld or delayed.

(g) Choice of Laws. This Agreement shall be interpreted under the laws of the State of Arizona. Any actions concerning interpretation or enforcement of this Agreement shall be brought in the Maricopa County Superior Court.

(h) This Agreement must be approved by the Tempe City Council.

(i) Conflict of Interest. This Agreement is subject to cancellation under the provisions of A.R.S. § 38-511.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the dates set forth below.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

By: _____

Print Name: _____

Title: _____

Date: _____

CITY OF TEMPE

By: _____

Print Name: _____

Title: _____

Date: _____

RIO SALADO TOWN LAKE FOUNDATION

By: _____

Print Name: _____

Title: _____

Date: _____

EXHIBIT A

The Logo shall appear as follows:

[insert]

The monument sign at the entrance to the Marina shall appear as follows:

[insert]

The banner with exposure to the Loop 202 shall appear as follows:

[insert]